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No. 190

In the Supreme Court of the United States

OCTOBER TERM, 1946

ZACHARY BOZZA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the circuit court of appeals (R. 137–144) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered May 17, 1946 (R. 145). The petition for a writ of certiorari was filed June 15, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure, effective March 21, 1946.

QUESTIONS PRESENTED

1. Whether one not disclosed by the evidence to have a proprietary interest in an illicit still, but who knowingly assists in the operation of the still, may be convicted as an aider and abettor, and hence as a principal under Section 332 of the Criminal Code, in the commission of the offenses of carrying on the business of a distiller with intent to defraud the United States of its taxes and of possessing an unregistered still, in violation of Sections 2833 (a) and 2810 (a), respectively, of the Internal Revenue Code.

2. Whether the addition of minimum mandatory fines to imprisonment sentences imposed earlier on the same day constitutes an invalid increase of the sentences by reason of the fact that service of the prison sentences had commenced before the addition of such fines.

3. Whether the trial judge's charge to the jury was unfair and prejudicial to petitioner.

STATUTES INVOLVED

The pertinent statutes are as follows:

> I. R. C., § 2833 (a): Any person who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not

less than $100 nor more than $5,000 and imprisoned for not less than thirty days nor more than two years. * * *

I. R. C., § 2810 (a): Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the collector of the district in which it is, by subscribing and filing with him duplicate statements, in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its cubic contents, the owner thereof, his place of residence, and the purpose for which said still or distilling apparatus has been or is intended to be used; * * *

* * * * *

And every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of $500, and shall be fined not less than $100, nor more than $1,000, and imprisoned for not less than one month, nor more than two years. * * *

I. R. C., § 2834: No mash, wort, or wash, fit for distillation or for the production of spirits or alcohol, shall be made or fermented in any building or on any premises other than a distillery duly authorized according to law; * * *. Every person who violates any provision of this section shall be fined for each offense not less than $500 nor more than $5,000, and be im-

prisoned not less than six months nor more than two years. * * *

Section 332 of the Criminal Code (18 U. S. C. 550): Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

STATEMENT

Count 1 of a six-count indictment filed in the District Court for the District of New Jersey charged that petitioner, Nicholas Chirichillo, Ellen Vettor, and Peter Milito engaged in the business of distilling, and distilled a quantity of spirits with intent to defraud the United States of the tax thereon, in violation of I. R. C., § 2833 (a) (*supra*, pp. 2–3). Count 2 charged that the same defendants had in their possession and custody a still set up, which had not been registered as required by law, in violation of I. R. C., § 2810 (a) (*supra*, p. 3). Count 3 charged that they fermented about 600 gallons of a mash fit for distillation in a building not a duly authorized distillery, in violation of I. R. C., § 2834 (*supra*, pp. 3–4). (R. 5–9.)[1] Petitioner and Chirichillo were convicted after trial by a jury on all of the five

[1] It is unnecessary to summarize the allegations of the last three counts. Count 6 (R. 9) did not concern petitioner, and his conviction was reversed by the Circuit Court of Appeals on counts 4 and 5.

counts[2] naming petitioner (R. 113). Petitioner was sentenced to concurrent terms of imprisonment for two years on each of counts 1, 2, and 3, and to a fine of $100 on count 1, a fine of $100 and a penalty of $500 on count 2, and a fine of $500 on count 3 (R. 2–3, 115). On appeal by petitioner alone, the convictions on counts 1, 2, and 3 were affirmed, but the convictions on counts 4 and 5 were reversed for insufficiency of the evidence to justify their submission to the jury, and the cause was remanded for entry of judgment of acquittal on those counts (R. 140, 142–144, 145).

The evidence adduced by the Government, so far as it relates to counts 1, 2, and 3, may be summarized as follows:

Some time in October 1944, Chirichillo and Ellen Vettor moved into a dilapidated farmhouse in Woodbridge, New Jersey, which Chirichillo had rented from a Mrs. Colacarro. Over a period of several weeks, Chirichillo and two others brought still parts into the farmhouse and set up a still. With the assistance of petitioner and others, Chirichillo proceeded to manufacture alcohol. (R. 10–16.) Petitioner was at the farmhouse "between two and three times a week," at which times "he would help, he would take instructions

[2] A severance was granted as to Ellen Vettor (R. 1), who pleaded guilty (R. 3) and became a witness for the Government (R. 10). A verdict of acquittal was directed in favor of Milito (R. 92).

from Nick [Chirichillo] and help him around" in the operation of the still (R. 18). Three times a week, Chirichillo and Ellen transported the alcohol to Newark for disposition. On these occasions they sometimes followed Milito's truck and sometimes petitioner's car, but Ellen never heard petitioner say where the alcohol was to be taken "because the conversation was not in my language." (R. 19–21.) In a midnight raid on the farmhouse, state police officials discovered the still, set up but not in operation. In addition to the distillation plant, they found bags of sugar, 600 gallons of fermenting sugar mash, and 2½ gallons of alcohol. (R. 137–138.) Petitioner offered no evidence at the trial.

ARGUMENT

1. With respect to count 1, petitioner contends that as a "mere casual employee" of Chirichillo, without "ownership, title or interest in the still, its operation or its product," he cannot be held to have been "engaged in carrying on the business of a distiller, with intent wilfully to defraud the United States of tax, and punished as a 'principal' " (Pet. 7, 8–11). It is not necessary, however, that a person have any proprietary interest in a still in order to hold him liable as an aider and abettor, and therefore, by virtue of Section 332 of the Criminal Code, as a principal, in the carrying on of a distilling enterprise with intent

to defraud the United States of revenue; it is sufficient to prove that he knowingly assisted another in the carrying on of the business. *Borgia* v. *United States*, 78 F. 2d 550, 555 (C. C. A. 9), certiorari denied, 296 U. S. 615; *Vukich* v. *United States*, 28 F. 2d 666, 669 (C. C. A. 9), certiorari denied, 279 U. S. 847; *United States* v. *Pritchard*, 55 F. Supp. 201, 203 (W. D. S. C.), affirmed *sub nom. Waters* v. *United States*, 145 F. 2d 240 (C. C. A. 4). In *Vukich* v. *United States, supra*, Vukich was convicted of carrying on the business of a distiller without having given bond as required by law, in violation of Section 3281 of the Revised Statutes (now Section 2833 (a) of the Internal Revenue Code). The evidence showed that Vukich had supplied sugar to the operators of an illegal distillery. Error was assigned to the trial court's refusal to instruct the jury that, in order to convict, it was necessary for the Government to prove that Vukich "was either the proprietor or had some proprietary interest in the still or its operation" (p. 667). Error was also assigned to the court's instruction that "if there were others than the defendant engaged in operating that distillery, and the defendant knew they were so engaged in operating it and aided and assisted them in its operation with the intent and for the purpose of carrying their activities to success, then and under such circumstances he would be a principal, and would, within the meaning of this act

be engaged in carrying on the business of a distiller, by reason of the law which says that whoever does the acts necessary to constitute a crime, or who aids or abets another in their commission, is a principal" (p. 668). It was held that the requested instruction was properly refused and that the instruction given was proper.

In the present case, the court instructed the jury that if they found that petitioner "was merely an underling, serving at the beck and call of an employer and nothing more than that [that] would not justify your finding him to be engaged in the business of a distiller. But if from the evidence you conclude logically that he aided and abetted in the carrying on of this business, then he would be chargeable as a principal" (R. 102). The jury was also instructed that "Before a defendant can be held as an aider and abetter the government must prove beyond a reasonable doubt that he committed an act which furthered or assisted the criminal transaction, and at the time he committed the act he knew that a crime was in process of commission, and with that knowledge he acted with intent to aid and abet in the criminal transaction" (R. 103). The evidence adduced against petitioner (*supra*, pp. 5–6) was plainly sufficient to warrant a finding that petitioner knowingly aided and abetted the carrying on of the illegal distilling business, and consequently was a principal by virtue of Section 332.

Taken as a whole, the trial judge's instructions, we believe, appropriately recognized that even the activities of an employee may be such, when coupled with the necessary intent and knowledge, as to make him *particeps criminis*. Thus, it has been held that an employee, without proprietary interest, may be held accountable as an aider and abettor, and therefore, under Section 332, as principal, in the carrying on, without payment of the required tax, of the business of a wholesale liquor dealer (*Wainer* v. *United States*, 82 F. 2d 305, 307 (C. C. A. 7), certiorari granted, limited to a question not here material, 298 U. S. 652, and affirmed, 299 U. S. 92) or of a retail liquor dealer (*United Cigar Whelan Stores Corp.* v. *United States*, 113 F. 2d 340, 346 (C. C. A. 9); *Mayer* v. *United States*, 259 Fed. 216, 217 (C. C. A. 6)). Of course, the fact that the business involved in the present case is that of distilling would not be a differentiating factor. There are, it is true, cases to the contrary, but for reasons to be noted we do not think they can be considered authoritative. In *Seiden* v. *United States*, 16 F. 2d 197 (C. C. A. 2), count 3 of an indictment charged that Seiden intended to "commence or continue the business of distilling without furnishing a bond." Seiden was found in a tenement where there was a still in operation. He was substantially unclothed and the circumstances strongly indicated that he was tending the still. The circuit

court of appeals, interpreting one of the instructions to the jury as permitting conviction on count 3 if Seiden was "no more than a workman for the owner of the still," reversed the conviction on that count. It simply stated that the statute on which it was based "was plainly directed only against the proprietor, and a workman cannot commit or abet it" (p. 199). Just why a workman, though chargeable with knowledge that the still was illicit (as the court said Seiden must be), could not "commit or abet" the offense charged, was not explained. In *Anderson* v. *United States*, 30 F. 2d 485 (C. C. A. 5), involving a prosecution for carrying on the business of a retail liquor dealer, without having paid the required tax, the court said (p. 487):

> One who is a mere employee may be guilty as an accomplice of making an illegal sale of liquor, but he cannot be an accomplice, and therefore regarded as a principal, in conducting a business, unless he is in fact one of the proprietors whose duty it is to pay the license tax.

No explanation for the distinction drawn was offered, and the only authority cited was *United States* v. *Logan*, 26 Fed. Cas. 990, No. 15,624 (C. C., E. D. Tenn.), which was a jury charge given in 1870, many years before the enactment of the general aider and abettor statute (Act of March 4, 1909, c. 321, § 332, 35 Stat. 1152). *Part-*

son v. *United States*, 20 F. 2d 127 (C. C. A. 8) involved a prosecution for the same offense as that on which count 1 of the present case was based. The evidence indicated that Partson was employed by the owner of the still to help operate it. The circuit court of appeals said (p. 129):

> The act of Congress under which he was indicted was a revenue act, the purpose of the section under which he was indicted was to prevent a distiller from defrauding the government out of the tax upon the product which he manufactured, and the defendant's intent to defraud was a condition precedent to his commission of the offense the section denounces. Partson had no interest in the property or the business. He was not and would not be liable for the tax, because neither the plant nor the product nor any part of it was or would be his property. There was no substantial evidence that he had any inducement to or purpose to defraud the government out of that tax. He was presumed to be innocent of any such intent and a studious review and consideration of all the evidence has forced our minds to the conclusion that all the substantial evidence in this case is not only as consistent with, but is more consistent with, innocence on his part than with his guilt of any intention to defraud the government out of the tax on the product Mr. Clausen was making.

While it seems to us that the court might well have held that there was sufficient evidence to establish that Partson knowingly aided in the operation of the still with intent to further Clausen's defrauding of the Government of its revenue, the case nevertheless turned upon an appraisal of the evidence as to intent.

Moreover, the *Seiden, Anderson* and *Partson* cases were decided prior to *United States* v. *Johnson,* 319 U. S. 503, 515, a case involving a prosecution for income tax evasion, in which this Court declared that all who consciously contribute to furthering an illicit enterprise and share in its execution are aiders and abettors in the commission of the offense and hence chargeable, under Section 332, as principals, notwithstanding the subordinate roles played by them in the execution of the scheme. Plainly, this standard of culpability is broad enough to embrace employees who knowingly assist their employer in the perpetration of an offense the gist of which is defrauding the Government of revenue.

In respect of count 2, petitioner contends that since the evidence did not show that he was alone at the still, it cannot be considered as having been within his possession, custody or control. However, under the authorities heretofore cited, to which should be added *Kelley* v. *United States,* 61 F. 2d 843, 848 (C. C. A. 8), there can be no doubt

that petitioner, by going regularly to the still premises and taking an active part in the operation of the still, aided and abetted Chirichillo in his unlawful possession and custody; hence, under Section 332, he was properly held accountable as a principal.[3]

With respect to count 3, petitioner contends that the Government failed to prove that petitioner fermented mash, or aided and abetted Chirichillo in so doing (Pet. 8, 12). The Government proved, however, that petitioner helped Chirichillo run the still and manufacture the whiskey, and since the fermentation of mash was one of the essential steps in the process of manufacturing the whiskey, the proof was sufficient to show that he aided and abetted in the making of the mash, and was therefore liable as a principal in the commission of that offense.

2. Petitioner contends that the imposition of fines under counts 1, 2 and 3 and a penalty of $500 under count 2 constituted an invalid increase of the prison sentences imposed on those counts, since he had already commenced service of those sentences (Pet. 8, 12–13). The facts on which this contention is based are as follows: On the morning of July 23, 1945, the trial judge im-

[3] In cases cited by petitioner (Pet. 11–12), a non-proprietor was either held to be chargeable, under the circumstances, with possession, custody or control of unregistered stills, or consideration was not given to the aider and abettor principle.

posed prison sentences on the counts in question (*supra*, p. 5). About five hours later, petitioner was recalled, and the court added certain minimum mandatory fines under counts 1, 2, and 3 and the mandatory penalty of $500 under count 2, such fines and the penalty being required by the respective statutes on which the counts were based (*supra*, p. 5). In the interim, petitioner had been taken to a marshal's detention room and from there removed to the Hudson County Jail in Jersey City, New Jersey, a federal place of detention, to await transportation to the place at which his prison sentences were to be served. (R. 116–117.)

It is true, as the circuit court of appeals observed (R. 141), that a judge is powerless to add to a sentence, once validly imposed, after the prisoner has begun to serve it. But it is well established that imposition of a sentence at variance with the statutory requirements is a void act. *In re Bonner*, 151 U. S. 242, 255–256; *In re Graham*, 138 U. S. 461, 462; *Ex Parte Karstendick*, 93 U. S. 396, 399. Such a sentence may consequently be superseded by a new sentence in conformity to the provisions of the statute, notwithstanding that the correction, even when it entails a greater punishment, occurs after the sentence has been partially served or after the term of court has expired. See the authorities cited by the circuit court of appeals (R. 141–142).

3. Petitioner finally contends that the trial judge's charge to the jury was "delivered in the form of an animated argument" and "went beyond permissible limits and amounted to acts of advocacy in favor of the government" (Pet. 8, 13–15). He complains principally of the judge's remarks concerning the rights of the people in a criminal trial (Pet. 14). But a reading of the entire portion of the charge (R. 106–108) of which petitioner complains, and from which he quotes excerpts out of context, is sufficient to show that the judge also stressed the rights of a defendant charged with crime and that he was as emphatic in his instructions to acquit if the jury thought the Government had not proved the defendants' guilt beyond a reasonable doubt as in his instructions to convict if they thought the defendants' guilt had been so proved. And when counsel for petitioner complained to the judge that from the intonation of his voice and striking of his desk the jury might have inferred that he was "arguing for a conviction," the judge was prompt to acquaint the jury with the nature of the exception, and specifically instructed them that he had no such intention and, in effect, that if they had gained such an impression, they should expunge it from their minds (R. 109–110). We submit, therefore, that there is no basis for a claim of reversible error.

CONCLUSION

The petition for a writ of certiorari does not, in our opinion, present any question requiring review by this Court. We therefore respectfully submit that it should be denied.

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